

1 WO

2  
3  
4  
5  
6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 Lexington Insurance Company, a Delaware  
10 Corporation,

11 Plaintiff,

12 v.

13 Scott Homes Multifamily, Inc., an Arizona  
14 corporation; and Silverbell 290 Limited  
15 Partnership, an Arizona Limited  
16 Partnership,

17 Defendants.

18  
19 Silverbell 290 Limited Partnership, an  
20 Arizona Limited Partnership, individually  
21 and as the assignee of Defendant Scott  
22 Homes Multifamily, Inc.,

23 Counterclaimants,

24 v.

25 Lexington Insurance Company, a Delaware  
26 corporation,

27 Counterdefendant.

No. CV-12-02119-PHX-JAT

**ORDER**

28 Pending before the Court is Defendant/Counterclaimant Silverbell 290 Limited Partnership's Notice of Motion and Rule 56(d) Motion to Continue Lexington Insurance Company's Motion for Summary Judgment (Doc. 58). The Court now rules on the Motion.

## I. BACKGROUND

On October 8, 2012, Plaintiff filed a complaint against Defendants. (Doc. 1). On October 31, 2012, Defendant Silverbell filed counterclaims against Plaintiff. (Doc. 10). On February 19, 2013, this Court held a Rule 16 Scheduling Conference and set the discovery deadline as February 7, 2014 and the dispositive motion deadline as April 18, 2014. (Doc. 40). On June 17, 2013, Plaintiff filed a Motion for Summary Judgment. In its Motion for Summary Judgment, Plaintiff argues that its excess insurance policy (the “excess policy”) has not been triggered in this lawsuit because the excess policy requires that all primary insurance be exhausted before excess coverage is available. Plaintiff argues that summary judgment is appropriate because: (1) the Evanston Policy has not been exhausted, (2) all underlying limits applicable to Scott Homes’ liability arising out of the work of American, Labrum, and Paramount have not been exhausted, and (3) the amounts of individual judgments awarded against Scott Homes for the work of Design, Gypsum, Littleton, and Structural I are not covered under the excess policy.

In response, Defendant Silverbell seeks relief pursuant to Federal Rule of Civil Procedure 56(d). Silverbell argues that additional fact discovery is necessary before it can respond to Plaintiff’s Motion for Summary Judgment. As a result, Silverbell requests a “realistic opportunity to pursue discovery relating to its theory of the case and defenses.”

## II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(d),

**When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

1 (3) issue any other appropriate order.

2 Fed. R. Civ. P. 56(d).

3 Where “a summary judgment motion is filed so early in the litigation, before a  
4 party has had any realistic opportunity to pursue discovery relating to its theory of the  
5 case, district courts should grant any Rule 56[d] motion fairly freely.” *Burlington*  
6 *Northern Santa Fe R&R, Co. v. Assiniboine and Sioux Tribes*, 323 F.3d 767, 773-74 (9th  
7 Cir. 2003) (internal citations omitted). The party requesting Rule 56(d) relief must show  
8 that: “(1) it has set forth in affidavit form the specific facts it hopes to elicit from further  
9 discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose  
10 summary judgment.” *Family Home and Fin. Ctr., Inc. v. Fed. Home Loan Mortgage*  
11 *Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (internal citations omitted). “Failure to comply  
12 with these requirements is a proper ground for denying discovery and proceeding to  
13 summary judgment.” *Id.* (internal quotation and citation omitted).

14 **III. ANALYSIS**

15 In its Rule 56(d) Motion, Silverbell claims that it needs the following discovery to  
16 respond to Lexington’s Motion for Summary Judgment: (1) Plaintiff’s underwriting  
17 guidelines and underwriting file; (2) depositions of Plaintiff’s claims handler and the  
18 claims handler’s supervisor; and (3) declarations relating to the payment by Evanston  
19 under its 2002 Evanston Primary Policy of its policy limits of one million dollars.

20 In Response, Plaintiff argues that Silverbell’s motion should be denied because  
21 Silverbell has not set forth, in an affidavit, the specific facts it hopes to elicit from further  
22 discovery, Silverbell has not established that such unidentified facts actually exist, and  
23 Silverbell fails to explain how the discovery is essential to defeat Plaintiff’s pending  
24 motion for summary judgment.

25 In its Reply, Silverbell lists what it deems to be specific facts that it seeks to obtain  
26 to respond to Plaintiff’s Motion for Summary Judgment. (Doc. 67 at 4-8).

27 Silverbell has failed to meet the requirements to obtain relief under Rule 56(d).  
28 As argued by Plaintiff, Silverbell has not set forth, in an affidavit, the specific facts it

1 hopes to elicit from further discovery, has not established that such unidentified facts  
2 actually exist, and has not explained how the discovery is essential to defeat Plaintiff's  
3 pending motion for summary judgment. Moreover, although Silverbell attempts to raise  
4 more specific facts in its reply, Silverbell still fails to meet the requirements of 56(d)  
5 because (1) such facts are not in the affidavit; (2) a party may not raise new arguments  
6 for the first time in its reply brief; and (3) the majority of the categories of facts sought by  
7 Silverbell seem to have little relation to the pending Motion for Summary Judgment and  
8 appear to be in the nature of a fishing expedition.

9       Nonetheless, the Court will allow Defendant Silverbell an additional 60 days from  
10 the date of this Order to respond to Plaintiff's Motion for Summary Judgment. In that  
11 time, it is incumbent on Defendant Silverbell to conduct *targeted* discovery. Such  
12 discovery must not be in the nature of a fishing expedition and any discovery disputes  
13 shall be brought to the Court's attention immediately. All discovery disputes shall be  
14 brought as set forth in the Rule 16 Scheduling Order (Doc. 40 at 4).

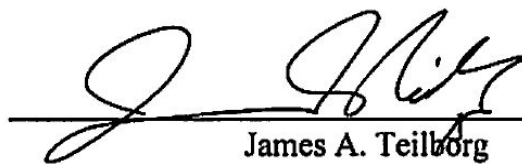
#### 15       **IV. CONCLUSION**

16       Based on the foregoing,

17       **IT IS ORDERED** that Defendant/Counterclaimant Silverbell 290 Limited  
18 Partnership's Notice of Motion and Rule 56(d) Motion to Continue Lexington Insurance  
19 Company's Motion for Summary Judgment (Doc. 58) is granted as follows:

20       **IT IS ORDERED** that Defendant Silverbell may have an additional 60 days from  
21 the date of this Order to respond to Plaintiff's Motion for Summary Judgment. In that  
22 time, it is incumbent on Defendant Silverbell to conduct *targeted* discovery. Such  
23 discovery must not be in the nature of a fishing expedition and any discovery disputes  
24 shall be brought to the Court's attention immediately.

25       Dated this 6th day of August, 2013.

26  
27  
28         
James A. Teilborg  
Senior United States District Judge